# The New Dutch Model Investment Agreement

## On the Road to Sustainability or Keeping up Appearances?

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**Abstract**

In 2019, the Dutch government presented a New Model Investment Agreement that seeks to contribute to the sustainability and inclusivity of future Dutch trade and investment policy. This article offers a critical analysis of the most relevant parts of the revised model text in order to appraise to what extent it could promote sustainability and inclusivity. It starts by providing an overview of the Dutch BIT (Bilateral Investment Treaty) programme, where the role of the Netherlands as a favourite conduit country for global FDI is highlighted. In the article, we identify the reasons why the Netherlands became a preferred jurisdiction for foreign investors and the negative implications for governments and their policy space to advance sustainable development. The 2019 model text is expressly set out to achieve a fairer system and to protect 'sustainable investment in the interest of development'. While displaying a welcome engagement with key values of sustainable development, this article identifies a number of weaknesses of the 2019 model text. Some of the most criticised substantive and procedural provisions are being reproduced in the model text, including the reiteration of investors' legitimate expectation as an enforceable right, the inclusion of an umbrella clause, and the unaltered broad coverage of investments. Most notably, the model text continues to marginalise the interests of investment-affected communities and stakeholders, while bestowing exclusive rights and privileges on foreign investors. The article concludes by hinting at possible reforms to better align existing and future Dutch investment treaties with the sustainable development goals.

**Keywords:** Dutch model BIT, foreign direct investment, bilateral investment treaties, investor-to-state dispute settlement, sustainable development goals

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## 1 Introduction

The Dutch government has set for itself ambitious plans for achieving 'policy coherence' in relation to development and sustainability, whereby the UN Sustainable Development Goals (SDGs) play a central role.[1] In this context, the Netherlands aims at reviewing the Dutch investment protection policy so as 'to ensure a fairer and more balanced system for promoting and protecting *sustainable* investments *in the interest of development* (SDG 17.15)'.[2]From an obscure field of law, international investment law became the subject matter of public debate and widespread contestation. Some (in-)famous cases, such as *Philip Morris* v. *Uruguay*, even became the 'guests of honour' of popular TV shows, from the United States to the Netherlands.[3] The inclusion of an Investment Chapter stalled the negotiations between the EU and the United States on the Transatlantic Trade and Investment Partnership (TTIP) (ahead of Trump), with the public consultation on Investor-State Dispute Settlement (ISDS) yielding an overwhelming negative response from European citizens.[4] It is worth emphasising that the public critique has been grounded in mounting empirical evidence against the investment law regime, which has also led hundreds of academics to sign letters criticising ISDS.[5]The Netherlands has con-

1. Cfr. 'Letter of 28 September 2017 from the Minister for Foreign Trade and Development Cooperation to the President of the House of Representatives on the Annual Report on Policy Coherence for Development (PCD).
2. *Ibid*, at p. 5, emphasis added.
3. *See*, for example, in the US Last Week Tonight with John Oliver, 'Tobacco', 15 February 2015, www.youtube.com/watch?v=6UsHHOCH4q8; in the Netherlands, Zondag met Lubach, 'ISDS the Real Life?', 4 October 2015, www.vpro.nl/zondag-met-lubach/speel~POMS_VPRO_2183978~isds-the-real-life~.html and VPRO Tegenlicht, 'TTIP: Recht van de sterkste', 4 October 2015, www.npostart.nl/vpro-tegenlicht/04-10-2015/VPWON_1232892#c6bd25ba3.
4. Approximately 98% of the respondents of the public consultation, launched by the European Commission on the TTIP, were contrary to the inclusion of ISDS in the agreement; *see* Commission, 'Consultation on Investment Protection in EU-US Trade Talks' (Press Release) IP/15/3201', http://europa.eu/rapid/press-release_IP-15-3201_en.htm; *see also*, European Commission Report of 13 January 2015, SWD (2015) 3 Final, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.
5. For one letter signed by more than 200 academics, *see*: Public Citizen, '220+ Law and Economics Professors Urge Congress to Reject the TPP



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cluded about hundred bilateral investment treaties (BITs).[6] Regrettably, the reputation of Dutch BITs fares no better than that of other investment agreements. Dutch BITs are mostly known for being investor friendly, rather than for promoting sustainable development. It is no coincidence that more than three-quarters of claims under Dutch BITs are brought by non-Dutch firms.[7]Against this background, the efforts of the Dutch government to reform its investment agreements appear a much needed step on the road to achieve policy coherence. These efforts have resulted in the adoption of the text of the New Model Investment Agreement (hereinafter New Model IA), which has been developed in dialogue with experts and stakeholders and after a process of public consultation and parliamentary debate.[8] In a letter to the House of Representatives, dated 28 October 2018, Sigrid Kaag, the Minister of Foreign Trade and Development Cooperation, states that 'sustainability' and 'inclusivity' are core concepts in future trade and investment agreements.

The New Model IA has introduced several innovations worth noting. Remarkable changes include the reference to the host states' right to regulate, to business-related human rights, sustainable development and corporate social responsibility as well as the requirement for investors to have substantial business activities in the host state. The drafters should be credited for having included these issues in the treaty text.

The main aim of this article is to appraise to what extent the new Dutch Model IA could promote sustainability and whether it meets the ambition of policy coherence, as explicitly pursued by the Dutch government in the context of the UN SDGs. In assessing the merits of the New Model IA, we do not aim to offer a detailed commentary of all its provisions. Rather, our analysis is limited to those provisions that are most salient for achieving (or hindering) sustainable investment policy and 'inclusivity'.

Given the specific goal of this analysis and the goals of this special issue, we do not engage with the possible implications of recent Opinion 1/17 or of other EU case laws for the current New Model IA.[9] As is well known, the Court of Justice of the European Union (CJEU) has focused the compatibility of EU-Canada Comprehensive Economic and Trade Agreement (CETA) with some dimensions of EU law (particularly with regard to the autonomy of EU law and the principle of equal treatment). The CJEU findings do not address our main question, i.e. the alignment of investment law with the goal of sustainable development. It should also be noted that, even though the CJEU ruled in Opinion 2/15[10] that almost all aspects of investment protection (except for non-direct investment and investor-to-state dispute settlement) are conferred to the EU under the Treaty of Lisbon, EU member states are allowed to continue negotiating and concluding new BITs, or renegotiating and amending existing ones, under Regulation 1219/2012.[11] Hence, while the EU is currently negotiating and concluding a raft of bilateral free trade and investment agreements with third countries, the Dutch government is still in charge over its BITs that regulate and protect the existing stock of foreign investment running to and from its treaty partners.

The article is structured as follows. In Section 2, we present an analysis of the existing Dutch investment agreements, identifying the major pitfalls. In Section 3, the most significant innovations of the New Model IA are explained and critically discussed. When we identify significant weaknesses in the New Model IA, we combine critique with the articulation of constructive alternatives. Section 4 concludes.

## 2 The Dutch Bilateral Investment Treaties: A Gold Standard for Transnational Capital

### 2.1 The Netherlands as a Conduit Country for Global FDI

The Dutch government actively works to create a competitive and attractive business climate in the Netherlands.[12] Multinational corporations often choose to

and Other Prospective Deals that Include Investor-State Dispute Settlement', 7 September 2016, www.citizen.org/wp-content/uploads/isds-law-economics-professors-letter-sept-2016.pdf; For another letter signed by more than 100 academics, *see*: ISDS Bilaterals, 'Legal Statement on Investor Protection and Investor-State Dispute Settlement Mechanisms in TTIP and CETA', 17 October 2016, http://isds.bilaterals.org/?legal-statement-on-investment&lang=en.

6. For an overview, *see*https://investmentpolicy.unctad.org/international-investment-agreements/countries/148/netherlands?type=bits.
7. UNCTAD Division on Investment and Enterprise, *Treaty-based ISDS cases brought under Dutch IIAs: An Overview*, available at: https://investmentpolicy.unctad.org/publications/135/treaty-based-isds-cases-brought-under-dutch-iias-an-overview.
8. The text has been discussed – among others – with the Breed Handelsberaad, an advisory group to the Ministry of Foreign Affairs, consisting of representatives of business, trade unions, civil society organisations and other stakeholders. *See*www.rijksoverheid.nl/onderwerpen/handelsverdragen-europese-unie/breed-handelsberaad; the text of the New Model Investment Agreement can be downloaded at: www.rijksoverheid.nl/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden.
9. Opinion 1/17, *Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218 (11) TFEU*, [2019] ECR, http://curia.europa.eu/juris/document/document.jsf?text=&docid=196185&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4974112.
10. Opinion 2/15 of 16 May 2017, in response to a *REQUEST for an opinion pursuant to Article 218(11) TFEU, made on 10 July 2015 by the European Commission*, ECLI:EU:C:2017:376, http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN.
11. Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012, pp. 40-46. The Regulation establishes certain conditions for negotiations, signing and ratification (*see* particularly, Arts. 7-11).
12. Netherlands Foreign Investment Agency, 'Invest in Holland. Leading Location for Innovation and Growth', https://investinholland.com/wp-

structure their investment through the Netherlands, because the country offers an attractive fiscal climate by offering low withholding taxes on dividends, royalties, interest and capital gains income.[13] The relatively weak substance requirements under Dutch law enable multinational corporations to set up holding companies, including letterbox companies and Special Purpose Entities (SPEs), in the Netherlands.[14] This allows them inter alia to take advantage of the extensive Dutch network of double tax treaties[15] and to make specific agreements with the Dutch Tax Authority (Advance Tax Rulings) on the size of their corporate tax base and the effective corporate tax rates.[16] In addition, a large Dutch network of BITs offers protection to investors against legal and/or regulatory changes in host countries that might affect their business operations.

As a result of these policies, the Netherlands has become a favourite 'conduit country' for multinational corporations, understood here as jurisdictions that function as 'attractive intermediate destinations in the routing of investments'.[17] The Netherlands is the world's number one country in terms of inward direct investment, ahead of much larger economies such as the United States, China and Germany. In 2018, inward direct investment in the Netherlands amounted to US $4,715 billion, while outward direct investment amounted to US$5,755 billion, making the country the second largest source of FDI after the United States.[18] The bulk of FDI in the Netherlands mainly originated from the United States (16%), Luxembourg (12%), United Kingdom (12%), Switzerland (6%) and Ireland (6%). Similarly, outward direct investments were predominantly directed at the United States (15%), United Kingdom (11%), Switzerland (9%), Germany (6%) and Luxembourg (5%).[19] A very large part of these FDI flows is attributable to Dutch SPEs. According to the Dutch Central Bank, there were approximately 15,000 SPEs in the Netherlands in 2017.[20] FDI flows through Dutch SPEs have in fact increased by 75% since the outbreak of the global financial crisis in 2008. Inward direct investment through SPEs in 2018 was €3,066 billion, whereas outward direct investment amounted to €3,246 billion in the same year.[21] Research by the University of Amsterdam confirms that the Netherlands is in fact the world's biggest conduit country, used for channelling funds to offshore financial centres often categorised as tax havens.[22]

### 2.2 The Dutch BIT Programme

The Netherlands currently maintains a total number of ninety-two BITs, of which eighty-seven are currently in force. Five BITs – with Brazil, Chile, Eritrea, Oman and United Arab Emirates – have been signed but not ratified.[23] The origins of the Dutch BIT programme can be traced back to the 1950s and 1960s, when many Western European countries started to develop instruments concerned with the promotion and protection of their economic interests abroad.[24] Particularly, the nationalisation of Dutch assets in its former colony Indonesia in the late 1950s formed an important motivation for the Dutch government to start negotiating BITs with developing countries.[25] The first BIT was signed with Tunisia in 1963, followed by a series of BITs with countries in Africa and Asia. Several of these early BITs already provided for arbitration at the International Centre for the Settlement of Investment Disputes (ICSID), the one with Indonesia (1968) being the first. This arbitration institute was established two years earlier under the leadership of Dutchman Aron Broches and with active support from the Dutch government.[26] Although more modern-type BITs were concluded with a number of countries during the 1970s, the Dutch network of BITs significantly expanded between the

content/uploads/2019/06/Invest-in-Holland-Leading-Location-for-Innovation-and-Growth.pdf (last visited 19 June 2019).

13. R. van Os, K. McGauran & I. Römgens, 'Private Gain – Public Loss. Mailbox Companies, Tax Avoidance and Human Rights', July 2013, www.somo.nl/wp-content/uploads/2013/07/Private-Gain-Public-loss.pdf.
14. Buren, 'New Dutch Substance Requirements Published', 29 January 2018, www.burenlegal.com/en/news/new-dutch-substance-requirements-published.
15. Dutch Tax Authority, 'Overview of Treaty Countries', https://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/belastingdienst/individuals/tax-regulations/tax_treaties/overview_of_treaty_countries/overview_of_treaty_countries (last visited 19 June 2019).
16. Dutch Tax Authority, 'Factsheet Rulings', https://belastingdienst-in-beeld.nl/themas/belastingheffing-en-internationale-structuren/factsheet-rulings/ (last visited 19 June 2019).
17. International Monetary Fund, 'Spillovers in International Corporate Taxation', *IMF Policy Paper* 2014:18 fn 35, www.imf.org/external/np/pp/eng/2014/050914.pdf.
18. International Monetary Fund, 'Coordinated Direct Investment Survey (CDIS)', data for 2018, latest update date 13 March 2020, https://data.imf.org/?sk=40313609-F037-48C1-84B1-E1F1CE54D6D5.
19. *See* IMF, above n. 18.
20. Dutch Central Bank, 'DNBulleting: Bijzondere financiële instellingen van beperkt belang voor Nederlandse economie', www.dnb.nl/nieuws/nieuwsoverzicht-en-archief/DNBulletin2018/dnb379675.jsp#:~:text=Het%20economisch%20belang%20van%20deze,)%2C%20zogenoemde%20brievenbusmaatschappijen%2C%20gevestigd (last visited 5 August 2020).
21. Dutch Central Bank, 'Geografie directe investeringen BFI's per jaar', data for 2018, latest update 12 December 2019, https://statistiek.dnb.nl/downloads/index.aspx#/details/geografie-directe-investeringen-bfi-s/dataset/f8af558c-65eb-46e9-b019-62a3daa264a2/resource/e193c8dc-98f1-47d6-b00f-600de659b5a0 (last visited 5 August 2020).
22. J. Garcia-Bernardo, J. Fichtner, F.W. Takes & E.M. Heemskerk, 'Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network', 7 *Scientific Reports* (2017), www.nature.com/articles/s41598-017-06322-9. *See also* A. Lejour, J. Möhlmann & M. van 't Riet, 'Doorsluisland Nederland doorgelicht', *CPB Policy Brief*, January 2019, www.cpb.nl/sites/default/files/omnidownload/CPB-Policy-Brief-2019-01-Doorsluisland-NL-doorgelicht.pdf.
23. UNCTAD, 'International Investment Agreements Navigator: Netherlands', https://investmentpolicy.unctad.org/international-investment-agreements/countries/148/netherlands (last visited 5 August 2020).
24. J. Bonnitcha, L.N. Skovgaard Poulsen & M. Waibel, *The Political Economy of the Investment Treaty Regime* (2017); L.N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy. The Politics of Investment Treaties in Developing Countries* (2015).
25. N. Schrijver and V. Prislan, 'The Netherlands', in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (2013) 535, at 541-542.
26. T. St John, *The Rise of Investor-State Arbitration. Politics, Law, and Unintended Consequences* (2018).

mid-1980s and mid-1990s when the Netherlands concluded a large number of treaties with former-communist and developing countries in Latin America. After a brief pause, whereby the Dutch government preferred to negotiate the ill-fated Multilateral Agreement on Investment (MAI) under the auspices of the Organisation on Economic Cooperation and Development (OECD) between 1995 and 1998, the Netherlands continued concluding new BITs with countries in Asia, Latin America and Africa during the early 2000s.[27]

Dutch BITs have been frequently negotiated on the basis of a model text. The first model BIT was drafted in 1979 and closely followed the 1967 OECD Draft Convention on the Protection of Foreign Property as well as model BITs of other Western European countries, most notably those of Germany, Switzerland and the UK.[28] The model BIT has undergone several updates and amendments, in 1987, 1993, 1997 and 2004, and often in close consultation with corporate industry.[29]

The Dutch BITs are generally characterised by their broad and open-ended provisions that are often euphemistically referred to as the 'gold standard' of foreign investment protection.[30] Their investor-friendly nature stems from their typically broad scope of application, general lack of balance and unrestricted access to ISDS.

#### 2.2.1 *Broad Scope of Application*

First, Dutch BITs generally rely on the widest possible definition of investment that covers 'any-kind-of-asset'.[31] The Dutch model BIT of 2004 uses an illustrative list that covers not only any type of property or claims to money but also any contractual performance having an economic value, intellectual property rights, asset categories such as goodwill and know-how and any rights granted under contract. Such a wide definition is problematic because it may cover economic transactions not contemplated by the parties or investments that do not necessarily contribute to – or even undermine – countries' development. It may also expose states to unexpected liabilities.[32] Second, the 2004 Dutch model BIT enables indirectly controlled foreign investors to be qualified as 'nationals', thereby granting also holding companies and SPEs without substantial business activities in the Netherlands protection under Dutch BITs.[33] Such a wide definition has facilitated widespread 'treaty-shopping' practices, whereby foreign investors have restructured their investments through the Netherlands both to profit from the attractive fiscal climate and to take advantage of the broad network of Dutch BITs.[34]

#### 2.2.2 *General Lack of Balance*

Dutch BITs are typically characterised by their asymmetric nature in that they offer foreign investors far-reaching rights without corresponding obligations. In the 2004 Dutch model BIT, each contracting party agrees to ensure broad and expansively interpretable protection for investors, including unqualified provisions such as fair and equitable treatment (FET) and national and most-favoured nation treatment, protection against direct and indirect expropriation and free transfer of payments related to an investment.[35] At the same time, the 2004 Dutch model BIT does not incorporate any provisions on corporate social responsibility and only refers to the promotion of 'internationally accepted labour standards' and the so-called right to regulate in the context of the non-binding preamble.[36]

#### 2.2.3 *Unrestricted Access to ISDS*

Dutch BITs enable foreign investors to circumvent national legal systems and to submit investment dis-



27. Ministry of Economic Affairs, ' Beleidsdoorlichting handelspolitiek: Eindrapport', Tweede Kamer, vergaderjaar 2007-2008, 30 991, nr.3, Den Haag (2007), at 33.
28. *See* Schrijver and Prislan, above n. 25.
29. Ministry of Economic Affairs, above n. 27.
30. N. Lavranos, 'In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs – A Member State Perspective', 10(2) *Transnational Dispute Management* 1, at 2 (2013); F. Fontanelli and G. Bianco, 'Converging Towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States', 50 *Stanford Journal of International Law* 211, at 221 (2014). *See also* commentaries by various practitioners and law firms, for example T.G. Nelson, 'Going Dutch – The Many Virtues of the Netherlands Model BIT', 6(2) *Dispute Resolution International* 161 (2012); H. Sprenger and B. Boersma, 'The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets', *Business Law Today*, March 2014, www.houthoff.com/-/media/Houthoff/Publications/bboersma/Investment_treaties.pdf?la=en&hash=B11E7EDD9B31F18173037B5CB38FE6F2AB8BC5C1. For a critical analysis, *see* R. van Os and R. Knottnerus, 'Dutch Bilateral Investment Treaties: A Gateway for 'Treaty Shopping', October 2011, www.somo.nl/wp-content/uploads/2011/10/Dutch-Bilateral-Investment-Treaties.pdf.
31. Art. 1(a) of the 2004 Dutch model BIT reads as follows:
    (a) the term "investments" means every kind of asset and more particularly, though not exclusively:
    i. movable and immovable property as well as any other rights in rem in respect of every kind of asset;
    ii. rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
    iii. claims to money, to other assets or to any performance having an economic value;
    iv. rights in the field of intellectual property, technical processes, goodwill and know-how;
    v. rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.
32. UNCTAD, *Investment Policy Framework for Sustainable Development* (2015), at 93.
33. Art. 1(b) of the 2004 Dutch model BIT reads as follows:
    the term "nationals" shall comprise with regard to either Contracting Party:
    i. natural persons having the nationality of that Contracting Party;
    ii. legal persons constituted under the law of that Contracting Party;
    iii. legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii).
34. UNCTAD, *Treaty-based ISDS Cases Brought Under Dutch IIAs: An Overview*, commissioned by the DG Foreign Economic Relations, Ministry of Foreign Affairs, the Netherlands, 2015. *See also*: S.H. Nikiéma, 'Best Practices Definition of Investor', IISD Best Practices Series, March 2012.
35. F. Ortino, *Substantive Provisions in IIAs and Future Treaty-Making: Addressing Three Challenges*, E15 Task Force on Investment Policy (2015), http://e15initiative.org/wp-content/uploads/2015/01/E15-Investment-Ortino-FINAL.pdf.
36. J. Gathii and S. Puig, 'Introduction to the Symposium on Investor Responsibility: The Next Frontier in International Investment Law', 113 *American Journal of International Law Unbound* 1 (2019).

putes directly before arbitral tribunals under the ICSID Convention.[37] There is no requirement to exhaust domestic remedies before submitting an ISDS claim, contrary to what is the rule under international customary law and international human rights law.[38] At the same time, local communities or other affected third parties whose interests and rights may be at stake have no meaningful legal avenues to participate in ISDS proceedings.[39]

Finally, Dutch BITs are difficult to amend or terminate. The 2004 Dutch model BIT provides for a standard duration of fifteen years after the Treaty entered into force, during which no one-sided change or withdrawal is allowed.[40] The BIT is tacitly extended for another period of ten years unless notice of termination is given by either contracting party at least six months before the expiration date. In case a treaty is terminated, investments made prior to the termination will continue to be protected by the treaty for a further fifteen years. Such provisions contribute to the 'constitutionalisation' of transnational economic governance.[41]

### 2.3 The Netherlands as a Gateway for Treaty-Shopping

As a preferred jurisdiction for foreign investors, the Netherlands is frequently acting as a home state for ISDS cases. At present, there are 1,023 known ISDS cases, with the Netherlands acting as home state of the claimant in 111 of these cases. This makes the Netherlands the second most popular home state – after the United States – in ISDS claims. A recent study calculated that multinational corporations and other investors using the Netherlands as their home base have submitted investment claims amounting to $100 billion.[42] Only 13% of these investors are in fact Dutch: 84% of the claims come from non-Dutch companies (i.e. the country of the ultimate or controlling parent is not based in the Netherlands) and 3% have an unknown origin. Letterbox companies with no substantial commercial or operational presence in the Netherlands have brought 77% of all Dutch claims.[43]

The global reach of the Dutch BIT network has substantial implications for governments and their policy space to advance sustainable development. Claims and compensation awards can add up to billions of dollars and can weigh heavily on government budgets, particularly in developing countries. This could have a 'chilling effect' on governments to bring in new legislative proposals, in order to avoid claims.[44] Foreign investors can use the threat of ISDS claims to make governments water down or even retract contested measures. In this way, companies can use BITs as an instrument to influence public policy in the countries in which they operate. There are growing indications that governments are sensitive to the threat of ISDS.[45] Transnational corporations and their legal advisers are all too aware of the power that ISDS emanates and are no longer using this mechanism as a 'last resort' when all other options to assert their rights are exhausted.[46] Corporations increasingly view ISDS as a 'deterrent' to stop unfavourable policies in their tracks.[47] In the event of a dispute, filing an ISDS claim can also increase the pressure to reach a settlement with the government concerned,[48] or act as a trump card that companies can use to obtain more favourable conditions or exemptions for their investments.[49]

37. Art. 9 of the 2004 Dutch model BIT. For a more general discussion of the asymmetric nature of ISDS, *see* for example A. Arcuri, 'The Great Asymmetry and the Rule of Law in International Investment Arbitration', in L. Sachs, L. Johnson & J. Coleman (eds.), *Yearbook on International Investment Law and Policy 2018* (2019); A. Yilmaz Vastardis, 'Justice Bubbles for the Privileged: A Critique of the Investor-state Dispute Settlement Proposals for the EU's Investment Agreements', 6(2) *London Review of International Law* 279 (2018); G. Van Harten, J. Kelsey & D. Schneiderman, 'Phase 2 of the UNCITRAL ISDS Review: Why "Other Matters" Really Matter', Osgoode Hall Law School of York University All Papers, 328, https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1335&context=all_papers.
38. M.D. Brauch, 'Exhaustion of Local Remedies in International Investment Law', IISD Best Practices Series, January 2017, www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf.
39. L. Cotula and M. Schröder, 'Community Perspectives in Investor-State Arbitration', IIED Land, Investment and Rights Series (2017); N.M. Perrone, 'The "Invisble" Local Communities: Foreign Investor Obligations, Inclusiveness and the International Investment Regime', 113 *American Journal of International Law Unbound* 16 (2019).
40. Art. 14 of the 2004 Dutch model BIT.
41. D. Schneiderman, *Resisting Economic Globalization. Critical Theory and International Investment Law* (2013); S. Gill and A. Claire Cutler (Eds.) *New Constitutionalism and World Order* (2014).
42. R. Knottnerus, R. van Os, B.J. Verbeek, F. Dragstra & F. Bersch, '50 Jaar ISDS. Een mondiaal machtsmiddel voor multinationals gecreëerd en groot gemaakt door Nederland', TNI, Both Ends, SOMO, Milieudefensie (2018), www.somo.nl/nl/wp-content/uploads/sites/2/2018/01/50-jaar-ISDS.pdf.
43. Knottnerus *et al*., above n. 42.
44. K. Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement', 7 *Transnational Environmental Law* 229 (2017).
45. M. Sattorova, *The Impact of Investment Treaty Law on Host-States: Enabling Good Governance?* (2018), at 149; Tienhaara, above n. 44; G. Van Harten and D.N. Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada', *Osgoode Legal Studies Research Paper No.26/2016*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2700238.
46. E.M. Hafner-Burton, S. Puig & D.G. Victor, 'Against International Settlement? Secrecy, Adjudication and the Transformation of International Law', *ILAR Working Paper*, January 2016, https://ilar.ucsd.edu/_files/publications/working-papers/working-paper-26.pdf.
47. *The Guardian*, 'TTIP: Chevron Lobbied for Controversial Legal Rights as "Environmental Deterrent"', 26 April 2016, www.theguardian.com/environment/2016/apr/26/ttip-chevron-lobbied-for-controversial-legal-right-as-environmental-deterrent; M. Vaudano, 'How the Lobbies Used the Threat of ISDS to Neuter the Hulot Act', 4 September 2018, www.bilaterals.org/?how-the-lobbies-used-thethreat-of&lang=en; P. Smith, 'Canberra Faces Legal Challenge on Carbon Scheme', 24 November 2009, www.ft.com/content/00cced94-d898-11de-b63a-00144feabdc0.
48. N. Bernasconi-Osterwalder and M.D. Brauch, 'The State of Play in *Vattenfall* v. *Germany II*. Leaving the German Public in the Dark', IISD Briefing Note, December 2014, https://www.iisd.org/system/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf; *see also* L. Johnson and B.S. Guven, 'The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest', *Investment Treaty News*, 13 March 2017, www.iisd.org/itn/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skartvedt-guven/.
49. C. Hamby, 'The Billion Dollar Ultimatum', 30 August 2016, https://www.buzzfeednews.com/article/chrishamby/the-billion-dollar-

One striking example of how transnational investors have used Dutch BITs to put pressure on governments is the case *Newmont* v. *Indonesia*, in which mining giant Newmont sued Indonesia under its BIT with the Netherlands after the Indonesian government introduced export restrictions on copper in 2009, including an export duty and a ban on the export of copper concentrate, which allegedly stalled production at the copper and gold mine operated by the company.[50] The mining law No.4/2009 on Mineral and Coal, which came into effect in 2014, was aimed at boosting domestic employment and the local economy and to support Indonesia in becoming less dependent on the export of raw materials. Ultimately, Newmont withdrew its claim after reaching an agreement with the Indonesian government that gave special exemptions from the contested mining law.[51] This case is illustrative of how the Dutch BIT has been instrumental in facilitating an American company (one of the most powerful in the world in the field of mining) to weaken the operation of a domestic law aimed at improving the local economy. Dutch BITs have also been used to sue Tanzania for revoking a banking license following allegations of money laundering and financing terrorism,[52] Croatia for revoking a permit to construct a golf course due to environmental concerns,[53] Uganda and the Philippines for taxation measures regarding fossil fuel extraction,[54] India for taxation measures applying to telecommunications,[55] Slovakia for establishing a unitary public health insurance system,[56] Nicaragua for local court decisions against supplier of pesticide due to health concerns[57] and Zimbabwe for agrarian land reforms.[58]

In recent years, various countries have expressed their discontent with the Dutch approach after being hit by one or more ISDS claims brought under Dutch treaties. Bolivia, Ecuador, India, Indonesia, South Africa, Tanzania, Uganda and Venezuela even proceeded to unilaterally terminate their BITs with the Netherlands. Several of these countries have formulated forward-looking alternative approaches to investment protection, seeking to establish a better balance between the rights of investors and their social responsibility, including by setting specific requirements to respect human rights and to contribute to sustainable development of the host country and local communities. Moreover, the widespread societal backlash against ISDS in the context of the evolving EU investment policy, most notably through the EU-US TTIP and the CETA, led to the idea of revising the Dutch model BIT in early 2015,[59] which formed part of a broader rethinking of trade and investment agreements by the Dutch Ministry of Foreign Affairs.[60] As mentioned in the Introduction, this reform process has led to the adoption of a New Model IA.

# 3 The New Model IA: On the Road to Sustainability or Keeping up Appearances?

Even if sustainable development remains a blurred concept, many agree that it includes socio-economic and environmental components.[61] In other words, there is no sustainable development without protection of the environment and its people. As mentioned earlier, investment agreements have been criticised for curtailing the regulatory capabilities of states, particularly in the realm of health, safety and environmental regulation.[62] It is a no brainer that if investment agreements essentially protect the interest of transnational capital,[63] while de facto inhibiting environmental regulation and the realisation of human rights of those affected by the investment, they become the nemesis of sustainable development rather than its ally. The New Model IA has allegedly been drafted in the spirit of defying the dark side of the system. In this new text, it is possible to distinguish two clusters of rules aimed at transforming Dutch BITs into more sustainable agreements. The first set of rules concerns the protection of the regulatory space of the Contracting Parties. The second aims at regulating the conduct of investors, most prominently by limiting business-related human rights abuses.

## 3.1 On the Road to Sustainability?

### *3.1.1 Restoring the Right to Regulate*

In line with recent innovations introduced by CETA, the New Model IA establishes a general right to regulate

ultimatum; B.J. Verbeek and M. Bakker, 'Bend or Break. How Shell Used an International Investment Treaty to Browbeat Nigeria into a Lucrative Deal on OPL 245 Oil Field', April 2019, www.somo.nl/wp-content/uploads/2019/02/Shell-Nigeria-EN.pdf.

50. *Nusa Tenggara* v. *Indonesia*, ICSID Case No. ARB/14/15.
51. H. Van Der Pas and R. Damanik, 'Netherlands-Indonesia Bilateral Investment Treaty Rolls Back Implementation of New Indonesian Mining Law. The Case of Newmont Mining vs Indonesia', Briefing Paper November 2014, www.tni.org/files/download/newmont-indonesia-case-4.pdf.
52. *Ayoub-Farid Michel Saab* v. *United Republic of Tanzania*, ICSID Case No. ARB/19/8.
53. *Elitech and Razvoj* v. *Croatia*, ICSID Case No. ARB/17/32.
54. *Total E&P* v. *Uganda*, ICSID Case No. ARB/15/11; *Shell Philippines* v. *Philippines*, ICSID Case No. ARB/16/22.
55. *Vodafone* v. *India (I)*, PCA Case No. 2016-35.
56. *Achmea* v. *Slovakia (II)*, PCA Case No. 2013-12.
57. *Shell* v. *Nicaragua*, ICSID Case No. ARB/06/14.
58. *Funnekotter* v. *Zimbabwe*, ICSID Case No. ARB/05/6.
59. Letter from the Minister of Foreign Trade and Development to the Chair of the House of Representatives, Kamerstuk 21 501-02, nr. 1481, Den Haag, 9 April 2015, https://zoek.officielebekendmakingen.nl/kst-21501-02-1481.html.
60. L. Ploumen, 'The Netherlands: Reforming EU Trade Policy: Protection, Not Protectionism', Non-paper, September 2016, www.rijksoverheid.nl/onderwerpen/handelsverdragen-europese-unie/documenten/vergaderstukken/2016/09/01/reforming-eu-trade-policy-protection-not-protectionism.
61. L. Fabrick, 'Sustainable Development: A Call to Arms', 38 *Urban Lawyer* 555 (2006).
62. *See* Tienhaara, above n. 44.
63. M. Kumm, 'An Empire of Capital? Transatlantic Investment Protection as Institutionalization of Unjustified Privilege', 4 *ESIL Reflections* (2015), www.esil-sedi.eu/node/944.

(Art. 2(2)).[64] The articulation of such right is important as it will preclude expansive interpretation of investors' rights (e.g. through 'the sole effect' doctrine), which is likely to have negative effects on domestic environmental and social policies. At the same time, a provision on the right to regulate remains general and ambiguous. In practice, the regulatory space of host countries has been limited through the application and expansive interpretation of vague norms such as the FET and indirect expropriation.[65] To further strengthen and give more meaning to the contours of the right to regulate, Article 9(2) of the New Model IA has introduced a list of criteria to define the FET. Moreover, Article 12(8) on Expropriation provides that

> non-discriminatory measures of a Contracting Party that are designed and applied in good faith to protect legitimate public interests, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity, do not constitute indirect expropriations.

The combined reading of these provisions may be considered to mitigate the problem related to regulatory chill, or at least some of the problems. This welcome departure from the text of the old Dutch BITs parallels the reforms of new-generation investment treaties and investment-chapters of mega-regionals, such as CETA,[66] and could be regarded as a step towards sustainability of Dutch investment policy.

#### *3.1.2 Making Investment Sustainable?*

A striking feature of most investment agreements is their lack of rules relating to investors' conduct or to the nature of sustainable investment. Such absence is in stark contradiction with the overarching goal of the investment system of contributing to sustainable development. The main impulse for change in this context is coming from developing countries, who are establishing investors' obligations in their new investment agreements. Examples are the 2015 India Model Investment Agreement and the 2016 Morocco-Nigeria BIT.[67] The New Dutch Model IA is also advancing new provisions regulating investors' conduct.

To begin with, Article 2(1) codifies the clean hands doctrine,[68] where it provides that the Agreement 'shall apply only to an investment, made in accordance with the applicable law of the host Contracting Party at the time the investment is made'. While not particularly innovative, this rule is a welcome innovation vis-à-vis old Dutch BITs.[69] To the extent that it will induce foreign investors to comply with domestic laws, this rule could be considered as instrumental to stir sustainable investments. Yet, when domestic laws are poor, Article 2(1) will lose some of its power. Moreover, the rule does not create incentives for the investor to continue to operate in compliance with the domestic laws in the post-establishment phase.

Article 7 on Corporate Social Responsibility mitigates this problem by establishing obligations for investors to 'comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws'. It is worth noting that Article 7(1) uses the term 'shall'. Because there is no clear mechanism of enforcement of these obligations, it remains to be seen what will be their practical implications. It could be speculated that Article 7(1) extends the clean hands doctrine also to the post-establishment phase of the investment. If Article 2(1) will likely be relevant for declining jurisdiction or to bar the admissibility of claims, Article 7(1) may only be applied when an investment dispute is decided on the merits. In other words, Article 7(1) could be invoked to reduce or deny damages of liability of the Respondent when an unlawful conduct of investors is found during the post-establishment phase.[70]

Articles 2(1) and 7(1) are complemented by several other provisions addressed to the Contracting Parties, and thus regulating the conduct of investors only indirectly. Article 5(3), for example, encourages Contracting Parties to establish access to remedies for victims of human rights:

> As part of their duty to protect against business-related human rights abuse, the Contracting Parties must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate

64. Art. 2(2) reads as follows: The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons. The mere fact that a Contracting Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectation of profits, is not a breach of an obligation under this Agreement. *See also* Arts. 8.9.1 and 8.9.2 CETA.
65. G. Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010', 29 *European Journal of International Law* 507 (2018); G. Ünüvar, 'The Vague Meaning of Fair and Equitable Treatment Principle in Investment Arbitration and New Generation Clarifications', in J. Jemielniak and A.L. Kjær (eds.), *Legal Interpretation in the Practice of International Courts and Tribunals* (2020), https://ssrn.com/abstract=2774078.
66. *See*, for instance on FET, Art. 8.10.2 CETA.
67. Morocco-Nigeria BIT, 'Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Republic of Nigeria', 3 December 2016, Art. 24, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download; BIT Model India, 'Text for the Indian Bilateral Investment Treaty', 28 December 2015. Art. 12, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download; Southern African Development Community, ' SADC Model Bilateral Investment Treaty Template with Commentary', July 2012 Art. 15, www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.
68. P. Dumberry, 'State of Confusion: The Doctrine of "Clean Hands" in Investment Arbitration After the Yukos Award', 17 *Journal of World Investment & Trade* 229, at 229-230 (2016).
69. Several investment treaties already include such clause, for an overview *see*: S.W. Schill, 'Illegal Investments in Investment Treaty Arbitration', 11 *LPICT* 281, at 283 (2012).
70. *Hulley Enterprises (Cyprus) Limited* v. *Russia,* PCA Case No. AA/226. 1827.

> means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. These mechanisms should be fair, impartial, independent, transparent and based on the rule of law.

By stimulating the creation of a domestic legal framework responsive to the violation of human rights, the rule can be seen as indirectly regulating investors' conduct and possibly contributing to sustainable development.

Article 6 affirms the commitment of Contracting Parties to sustainable development, mainly by encouraging them to maintain high levels of environmental and labour protection. Paragraph 4 is noteworthy, where it provides that, 'The Contracting Parties recognize that it is inappropriate to lower the levels of protection afforded by domestic environmental or labor laws in order to encourage investment'. This provision may become relevant when interpreting the concept of legitimate expectation, which is codified later in the Treaty. It could be argued that if a contracting party makes promises that lower the levels of protection afforded by environmental or labour laws, these could not be considered as creating 'legitimate' expectations. Arguably, in light of Article 6(4), any expectation deriving from the lowering of environmental or labour laws should be considered illegitimate. It is also noticeable that, under Article 6(6), the obligations of the contracting parties under international environmental and human rights agreements are explicitly placed under the 'scope and application of this Agreement'. This provision may prove instrumental in interpreting other provisions of the New Model IA in light of environmental treaties, ILO conventions and Human Rights Treaties to which the parties are signatories.

Last but not least, Article 7 on *Corporate Social Responsibility* reaffirms the commitment of the parties to

> the international framework on Business and Human Rights, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, and commit to strengthen this framework.

The fact that the leading instruments on Business and Human Rights permeate the text of an investment agreement can be considered a key condition for transforming the investment regime into a legal regime compatible with the goals of sustainable development.

One of the most meaningful reforms of the model IA is to be found in the revised definition of investor. Article 1(b.ii) requires legal persons to have 'substantial business activities' in the territory of the contracting party. Article 1(c) clarifies that these may include a registered office and administration, headquarters and management, an office, production facility or research laboratory, number of employees and turnover generated in that contracting party. Likewise, the model IA lays down that the arbitral tribunals established under the treaty shall decline jurisdiction if an investor has changed its corporate structure with a main purpose to submit a claim 'at a point in time where a dispute had arisen or was foreseeable' (Art. 16(3)). Although their effectiveness remains to be seen in the context of arbitration, such provisions mark a radical breakaway from existing Dutch treaty practice and are likely to limit the scope for abuse by letterbox companies.[71]

### 3.2 Or Keeping up Appearances?[72]

If the discussed provisions display a certain degree of engagement with key values of sustainable development, they also expose the limited ambition of the New Model IA. Regrettably, many of the discussed provisions are drafted in hortatory jargon, and their effects to achieve sustainability may be of limited practical relevance. Their main weakness is that they are unenforceable. In fact, there are no specific rules to grant investment-affected communities the right to initiate a dispute to hold the investor or the contracting party accountable to their obligations. Moreover, the New Model IA reproduces some of the most criticised substantive provisions in Investment Agreements, such as umbrella clauses. In the following analysis, we identify the most problematic dimensions of the New Model IA. We start by looking at substantive rules and then focus on more procedural issues.

#### *3.2.1 Reaffirming Unjustifiable Privilege*

As discussed in the previous section, the New Model IA is to be praised for clarifying the FET. At the same time, important provisions, including some relating to FET, remain formulated in ways that can be abused by investors and their lawyers. Article 9(4), for example, reiterates a much-contested jargon on 'legitimate expectations' accruing to investors as a consequence of specific representations made by one of the contracting parties. While seemingly narrowing down the potential for expansive interpretations of what constitutes investors' legitimate expectations,[73] as various arbitral tribunals have done so in the past, the conceptualisation of such expectations as deriving from specific representa-

71. B.J. Verbeek and R. Knottnerus, 'The 2018 Draft Dutch Model BIT: A Critical Assessment', *Investment Treaty News*, 30 July 2018, www.iisd.org/itn/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knottnerus/.
72. Some parts of this section draw on A. Arcuri, 'Position Paper on the Netherlands Model Investment Agreement Submitted upon the Invitation by the Dutch Parliamentary Committee on Foreign Trade and Development Cooperation', 19 October 2018, www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2018A04650. For reasons of readability, passages from this position paper are not indicated in quotation marks. With this footnote, we acknowledge that a few sentences are taken verbatim from the position paper.
73. In this context, it has been noted that 'the lack of a rigorous analysis by tribunals supporting the use of legitimate expectations characterizes the majority of investment treaty awards'. *See* M. Potesta, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept', 28 *ICSID Review* 88, (2013) at 89.

tions still provides investors with extraordinary rights.[74] One problem is that in the absence of a clear definition on the specificity of the representation, different types of written or oral communications to the investor could potentially generate legitimate expectations.[75] For example, in *MTD* v. *Chile*, the tribunal took into account the Chilean President's toast speech at a dinner with the president of the home state of the investor in favour of the respective investment project.[76] In other cases, tribunals have refused to consider political or other informal statements as specific representations.[77]

More generally, the limit of the doctrine of legitimate expectations is that various organs of a contracting party could make specific representations to foreign investors to the detriment of the public interest of the host country, and they could do so without involving potentially affected local communities. Take for instance *Metalclad* v. *United Mexican States*. The case relates to the construction and operation of a hazardous waste landfill by US company Metalclad in the early 1990s in the municipality of Guadalcazar. The company obtained the necessary permits at the federal and state levels but not from the municipal authorities. According to Metalclad, representatives of the federal government reassured them that the permit at the municipal level was not necessary. The arbitrators found that 'Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill'.[78] While on its face, this conclusion about legitimate expectations may appear unproblematic, it disregards some extremely controversial circumstances. Most notably, from the very beginning, there was vigorous (and pre-existing) opposition to the project from the local community because of the likely damages to the environment and harm to the health of the nearby residents.[79] One independent consultant for example maintained that

> soils [in the area of the landfill] are very unstable and could fracture the membranes of the confinement cells, which could permit leakage to infiltrate the subsoil, surface waters to become contaminated during the rainy season or permit infiltration into deep aquifers.[80]

Not only that. According to Mexican lawyers, the municipality had the power to issue the permit, although the arbitration tribunal gave a different interpretation of the Mexican constitution.[81] The point here is that the doctrine of legitimate expectation can potentially disband the interest of local communities from the realm of legitimate politics within liberal democracies. In this respect, it has also been noted that the doctrine

> potentially encourages investors to secure commitments from those branches or levels of government most supportive of their projects in order to protect themselves against less favorable responses from other government officials or entities. This outcome rewards negligent – if not knowingly wrongful – conduct.[82]

While tribunals have at times been nuanced, there remains a plausible risk that the doctrine of legitimate expectations will be used to frustrate communities' rights to a healthy environment, rights to land, etc. Embedding in the treaty text the 'legitimate expectation' jargon is likely to entrust investors with stronger rights, which in turn may leave the expectations of investment-affected people to a healthy environment and to strong socio-economic rights unfulfilled. As discussed earlier, by providing that 'it is inappropriate to lower the levels of protection afforded by domestic environmental or labor laws in order to encourage investment', Article 6.4 may mitigate some of these risks; regrettably, though, Article 6.4 remains silent on cases where environmental law and social regulation are to be improved, or when a permit for a hazardous activity is denied to protect the health of nearby communities and the environment. Arguably, these are core issues when considering 'legitimate expectations'.

Ultimately, the problem with 'legitimate expectations' is that, by elevating the interests of investors above all other interests, investment agreements may turn into 'legitimate' something that would be highly illegitimate from the perspective of sustainable development and deliberative democracy. For example, expecting that governments will not take action to combat climate change because of some promises made should not be deemed legitimate. Take the threatened legal action by German energy company Uniper against the Dutch

74. L. Johnson, 'A Fundamental Shift in Power: Permitting International Investors to Convert Economic Expectations into Rights', 65 *UCLA Law Review Discourse* 106 (2018).
75. In this context, we do not discuss the fulfilment of contracts as legitimate expectations. We concur with Potestà that by doing so, there is a risk of conflating FET with umbrella clauses, *see* Potestà, above n. 73, at 101. *See also Parkerings-Compagniet AS* v. *Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007) para. 344. For a critique of umbrella clauses, as enshrined in the Dutch Model IA, *see* below our discussion of Art. 9(5).
76. Potestà, above n. 73, at 107.
77. For an overview of this body of case law, *see* Potestà, above n. 73, at 103-110.
78. *Metalclad Corporation* v. *United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000), para. 89.
79. A. Wheat, 'Toxic Shock in a Mexican Village', https://multinationalmonitor.org/hyper/mm1095.07.html (last visited 12 August 20).
80. *Ibid*; for an in-depth analysis of the Metalclad case *see* S.M. Wilkinson, 'NAFTA, Mexico & Metalclad: Understanding the Normative Framework of International Trade Law' (LLM thesis, University of British Columbia, 2002), https://open.library.ubc.ca/collections/ubctheses/831/items/1.0077545.
81. For a critique of the position taken by the Tribunal vis-à-vis in interpreting the domestic constitution, *see* D. Schneiderman, 'A New Global Constitutional Order?', in R. Dixon and T. Ginsburg (eds.), *Research Handbook On Comparative Constitutional Law,* 15 March 2010 (2011) 189-207. Available at SSRN: https://ssrn.com/abstract=1973046.
82. *See* Johnson, above n. 74.

state for its announced policy of phasing out coal power. According to some sources, Uniper maintains that the Dutch government induced their investment.[83] This type of reasoning (representations made by public officials induce investments, hence expectations are legitimate) shields business activity from negligent decision-making. It is undeniable that at the time of the Uniper investment, there was consensus on climate science and the need to act upon it.[84] The logic underpinning legitimate expectations may in fact take away responsibility from polluting/exploitative industries in a way that is considered highly problematic by experts.[85]If the Dutch government wants to stay faithful to its ambition of policy coherence, it should either remove the locution 'legitimate expectation' from the New Model IA, or specify that, *irrespective of the specific representations* made by government officials, no legitimate expectations can accrue to investors against the adoption of legitimate public interest regulation (or related administrative measures).

The New Model IA is also problematic in so far as it also covers a 'written commitment with investors … regarding a specific investment', established under the umbrella clause in its Article 9(5). This typology of provisions has been contested and can be considered at odds with human rights-compatible investment treaties. One basic mechanism by which human rights can be hampered by umbrella clauses is that specific agreements made with investors could be to the detriment of human rights (e.g. by selling to investors cheap lands unduly taken from aboriginal people; by granting concessions to exploit natural resources without proper consideration of the interests of local communities, etc.).[86] With an umbrella clause, it may be hard to restore a situation respectful of human rights because the state has its hands tied by the contract concluded by the previous government. This has been well explained by Prof. Sornarajah:

> Often … the state, or the elites which control it, are also participants along with the multinational corporation in the human rights abuse. Succeeding governments may, however, want to remedy the situation but may be deterred from doing so by the fact that such interference may be regarded as an infringement of the investor's rights under the treaty.[87]

Most new (model) investment agreements do not contain such clauses, including CETA. Against the backdrop of this reasoning, it is clear that such types of clauses may stand in the way of sustainable development.

Last but not least, in terms of covered investments, the New Model IA continues to rely on the widest possible definition that covers 'every-kind-of-asset' (Art. 1.a). As explained earlier, such a wide definition is problematic as it allows for the protection of all kinds of FDI, irrespective of the nature of the investment, the behaviour of the investor or the social, economic or environmental impact of the investment. Moreover, this definition goes beyond the traditional notion of FDI and also covers portfolio investment and other financial and short-term speculative capital flows that are less likely to produce tangible benefits for the host economy.

The New Model IA does require investments to have certain characteristics, including a certain duration, a commitment of capital or other resources, the assumption of risk and the expectation of gain or profit. However, a contribution to the economic development of the host state, one of the *Salini*-criteria, is notably missing. Hence, the model IA seems to miss a golden opportunity to include more ambitious characteristics to ensure that the covered investments bring concrete benefits to the sustainable economic development of the host country.

#### *3.2.2 Excluding Investment-Affected Communities, without Apology*

Another fundamental problem with the New Model IA is that the interests of investment-affected communities remain highly marginalised. These actors have no real access to justice. Numerous scholars have criticised the asymmetry characterising the great bulk of international investment agreements.[88] By now, there is a wealth of evidence showing how foreign investments may negatively affect local communities and how investors are able to influence the public policy of host countries.[89] In light of this thick body of evidence and to be faithful to

83. D. Keating, 'Dutch Lawmakers Under Pressure Over Coal Phase-Out', *Forbes*, 2 December 2019, www.forbes.com/sites/davekeating/2019/12/02/dutch-lawmakers-under-pressure-over-coal-phase-out/.
84. N. Oreskes, 'The Scientific Consensus on Climate Change', 306 *Science* 1686 (2004).
85. P.C. Frumhoff, R. Heede & N. Oreskes, 'The Climate Responsibilities of Industrial Carbon Producers', 132(2) *Climatic Change* 157-71 (2015).
86. In this context, it has been noted that various contracts between States and investors could be detrimental to the local population, such as in the case of 'land grabbing'. For a thorough study of the issue, *see* F. Violi, 'La sovranità permanente degli Stati sulle risorse naturali ed il fenomeno del Land Grabbing' (PhD Thesis, University of Milan) (defended in 2015, https://air.unimi.it/retrieve/handle/2434/251304/343407/phd_unimi_R09750.pdf); F. Violi, 'The Regulatory Vicious Circle of Investment Operations in Agriculture', in M. Alabrese, M. Brunori, S. Rolandi &, A. Saba (eds.), *Agricultural Law. LITES - Legal Issues in Transdisciplinary Environmental Studies*, Vol. 1. (2017) Springer; *see also* L. Cotula, 'Land Deals, What's in the Contracts?' IIED (2012), p. 7 ss.
87. M. Sornarajah, *The International Law on Foreign Investment* (2010), at 227-8 (*see also* further discussion of umbrella clauses at 304); For a general overview of how umbrella clauses developed and how they have been interpreted, *see*: K. Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements', *OECD Working Papers on International Investment, 2006/03,*www.oecd.org/daf/inv/investment-policy/WP-2006_3.pdf.
88. F.J. Garcia, L. Ciko, A. Gaurav & K. Hough, 'Reforming the International Investment Regime: Lessons from International Trade Law', 18 *Journal of International Economic Law* 861 (2015); Arcuri, above n. 37; *See also*, the AJIL Symposium, 'Investor Responsibility: The Next Frontier in International Investment Law', 113 *American Journal of International Law Unbound* (2019).
89. D. Schneiderman, 'Investing in Democracy? Political Process and International Investment Law', 60 *University of Toronto Law Journal* 909 (2010); N.M. Perrone, 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?' 7 *Transnational Legal Theory* 383 (2016); Cotula and Schröder, above n. 39; Sattorova, above n. 45.

the ideal of sustainability, the New Model IA should establish *enforceable* rights for investment-affected people corresponding to clear obligations for investors.

At a first reading, some provisions in the New Model IA may be read as enhancing access to justice of the investment-affected communities. However, on closer scrutiny, these provisions are rather weak if not altogether immaterial. Article 7(4) introduces, for example, a liability rule for the investor 'in accordance with the rules concerning jurisdiction of their home state', which could allegedly be seen as a rule making the enforcement of the rights of investment-affected communities possible.[90] While the rule establishing obligations for investors, as per Article 7(1), is a key and commendable innovation of the New Model IA, the formulation of Article 7(4) is redundant, failing to provide an effective avenue for enforcement. First and foremost, the rules concerning jurisdiction in the home state of the investors are far from clear and often lead to a *forum non conveniens*,[91] as it happened in some of the most dramatic industrial disasters caused by foreign investors, from the Bhopal disaster[92] to the oil pollution that Chevron-Texaco caused in Ecuador.[93] As already noted by Prof. Schepel,

> if the Netherlands is serious about investor liability, it should incorporate the whole of the International Institute for Sustainable Development's Model clause, and not just an emasculated version of the first paragraph.[94]

This model clause provides clear rights for the communities to bring a claim against investors and it explicitly prohibits *forum non conveniens*.[95]

It should also be added that, even when the investment-affected communities would have access to justice through their domestic courts, the investor still retains the right to initiate a parallel investor-host state dispute. ISDS can intersect with the operation of domestic courts, rendering domestic justice ineffective. *Chevron* v. *Ecuador* is an exemplar case in this respect. After having been denied access to US Courts, on the basis of a *forum non conveniens*, the victims of the oil pollution managed to obtain compensation through domestic judicial proceedings. However, the investor has launched an investment arbitration dispute, where the Arbitration Tribunal has blocked the ruling from the Ecuadorian courts and has awarded more than $77 million in damages to the investors.[96] Through investment arbitration, the alleged victims have been unapologetically expropriated of their access to justice.

In this context, Article 23 should be mentioned, which contains an innovative way of dealing with investor behaviour, whereby an arbitral tribunal 'is expected' to consider, when determining compensation, any investor non-compliance with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. This provision is commendable and yet, a potential lowering of damages does not produce an effective mechanism for states and/or affected communities to hold investors to account in case of human rights violations and non-compliance with other areas of domestic and international law.[97]

Next to the International Institute for Sustainable Development's model clause, a constructive alternative to Article 7(4) is to effectively entrust investment-affected communities with access to justice by making the obligations of investors enforceable.[98] Such change would provide the investors with incentives to operate



90. Art. 7.4 reads: Investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.
91. A.X. Fellmeth, 'Wiwav. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?', 5 *Yale Human Rights and Development Journal* 241 (2002); J.P. Verheul, 'The Forum (Non) Conveniens in English and Dutch Law under Some International Conventions', 35 *The International and Comparative Law Quarterly* 413 (1986); D.W. Rivkin and S.M. Grosso, 'Forum Non Conveniens: A Doctrine on the Move', 5 *Business Law International* 1 (2004).
92. S.L. Cummings, 'International Mass Tort Litigation: Forum Non Conveniens and the Adequate Alternative Forum in Light of the Bhopal Disaster', 16 *Georgia Journal of International and Comparative Law* 109, at 114-123 (1986).
93. S. Joseph, 'Protracted Lawfare: The Tale of Chevron Texaco in the Amazon', 3 *Journal of Human Rights and the Environment* 70 (2012); For discussion of damages *see*: H. Bautista & K.M. Mijanur Rahman, 'Effects of Crude Oil Pollution in the Tropical Rainforest Biodiversity of Ecuadorian Amazon Region', 8 *Journal of Biodiversity and Environmental Sciences* 249 (2016).
94. H. Schepel, 'Position paper for the Roundtable on the Dutch Model BIT Parliamentary Commission for Foreign Trade and Development Cooperation', 28 January 2019, www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2018A04650.
95. The Model Clause reads: Investor Liability
    1. Investors and their investments shall be subject to civil actions for liability in the judicial process of their home state for the acts, decisions or omissions made in relation to the investment where such acts, decisions or omissions led to damage, personal injuries or loss of life in the host state.
    2. Parties shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of the Investor for damages resulting from alleged acts, decisions or omissions of the Investor and/or its investment in the territory of other Parties.
    3. In particular,
    i. each Party shall ensure that its domestic courts shall not decline to hear such actions based on forum non conveniens or any similar judicial rule in the Party.
    ii. each Party shall allow its courts to look at the structure of the Investor and its investments to impose liability on the parent corporation and/or a sister subsidiary if the acts, decisions or omissions of the Investor or its investment led to damage, personal injuries or loss of life in the host state. www.iisd.org/library/iisd-model-international-agreement-investment-sustainable-development-negotiators-handbook.
96. *Chevron Corporation and Texaco Petroleum Corporation* v. *The Republic of Ecuador*, PCA Case No. 2009-23.
97. L. Cotula and T. Berger, 'IIED Submission to the Online Consultation on the Netherlands Draft Model BIT', June 2018, https://pubs.iied.org/pdfs/G04310.pdf. On the limitations of this approach to investor behaviour, *see also* the following commentaries on the *Copper Mesa* v. *Ecuador* case, J. Ho, 'The Creation of Elusive Investor Responsibility', 113 *AJIL Unbound* 12-13 (2019); Perrone, above n. 39, at 20.
98. In this article, we focus on reforms that would maintain investor-state arbitration. Alternatively, the ISDS system now entrenched in the New Model IA could be substituted with alternative complaint mechanisms. For a more articulated discussion of such type of reforms, *see* A. Arcuri and F. Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties', 59 *Boston College Law Review* 2791 (2018),

while respecting the rights of the local population and their environment, and it would constitute a more credible strategy to pursue sustainable investment policy. Drawing on existing research, we make a few recommendations on how the New Model IA could be reformed in this sense.[99] First of all, Article 2 could be revised so as to make clear that the scope of application of the Agreement extends also to the conduct of investors. This may be now derived from other provisions, but is not clearly stated in Article 2. Second, while Article 7(1) already refers to important rules of corporate social responsibility, it is crucial to explicitly include among the mandatory obligations of investors also those set out in Part II of the UN Guiding Principles on Business and Human Rights, which are the most widely consented set of obligations for businesses operating in foreign jurisdictions.[100]

On the more procedural side, in order to make the obligations of investors enforceable, a provision should be added to grant jurisdiction to the arbitral tribunal established under the treaty to hear disputes initiated by host states, as well as individuals or groups of individuals, claiming to be negatively affected by a violation of investors' obligations. This could be achieved by modifying the text of Article 16(1). As to the consent of investors to arbitration, this could be linked to her decision to invest in the territory of the other contracting party. If the investor explicitly refuses to consent to arbitration, he/she should lose all the rights to initiate a dispute under the Agreement. At a minimum, a provision could be added to grant the right to host states and individuals (or groups of individuals) to raise counterclaims and to join proceedings.

One example of such a reformed article has been articulated in response to a call for drafting human rights compatible Investment Agreements in the context of the UN Forum on Business and Human Rights and it reads as follows:[101]

> [Article #__ ]
> The jurisdiction of the Tribunal shall extend to any legal dispute related to an investment
> a. between a Contracting Party and an investor of another Contracting Party;
> b. between an individual or groups of individuals of one Contracting Party and an investor of the other Contracting Party(ies).
> Applications may be submitted by investors, claiming that their rights under this Treaty have been violated by the Host Contracting Party.
> Applications may also be submitted by individuals or groups of individuals claiming to be negatively affected by a violation of investors' obligations included in this Treaty. Non-governmental organizations showing a sufficient interest shall have equal right to submit a claim before this Tribunal, according to the rules and procedures included herein.
> Claims can be brought only after having exhausted local remedies.
> Applications may also be submitted by the Host Contracting Party claiming a violation of investors' obligations included in this Treaty.
> When either the Host Contracting Party or the individuals (or groups of individuals) have initiated proceedings against the investor of the other Contracting Party, either the individuals (or groups of individuals) or the Host Contracting Party respectively may join proceedings.
> By investing in the territory of the Host Contracting State, the investor consent to the jurisdiction of the Tribunal. The investor may refuse to grant consent only in written form, by submitting an official letter to the competent authority of the Contracting Party. Refusal to grant consent shall be expressed within three months from the first establishment made in the territory of the other Contracting Party. If the investor is already operating in the Host State when the treaty has entered into force, refusal to grant consent can be expressed in the same form within three months from the time of entering into force of the Treaty. The investor can always withdraw her consent; Any such withdrawal shall take effect upon the expiry of ten/fifteen years after the date of receipt of the note whereby the investor repudiates the Tribunal's jurisdiction. When the investor releases a letter to not grant her consent to the jurisdiction of the Tribunal, the investor loses ex tunc all rights and benefits granted by this Agreement [Treaty], including the right to initiate a dispute before the Tribunal.
> When investor's consent is refused or withdrawn, Contracting Parties shall not give consent to any contractual or otherwise agreed dispute settlement clause allowing Investor-State arbitration.

In this context, it is noted that one of the first economic partnership agreements between the Netherlands and Indonesia already included a provision that made the right to initiate disputes possible also for host states.[102] Article 16(2) on the limits to the tribunal jurisdiction should be expanded so as to apply not only to investors' conduct when the investment is established, but throughout all the phases of the investment, including the post-establishment phase. It is also important that

https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3715&context=bclr.

99. For a more detailed proposal for a human rights-compatible investment treaty establishing enforceable obligations for investors, *see*: A. Arcuri, F. Violi & F. Montanaro, 'Proposal for a Human-Rights Compatible International Investment Agreement: Arbitration for All', *UN Forum on Business and Human Rights* (2018), www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx; *See also* Arcuri and Montanaro, above n. 98.

100. *See* J.G. Ruggie, 'Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights', 23 January 2015 (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726.

101. *See* Arcuri, Violi & Montanaro, above n. 99.

102. *See* Art. 11 of the Netherlands-Indonesia Agreement on Economic Cooperation (with Protocol and Exchanges of Letters dated 17 June 1968). Signed at Jakarta on 7 July 1968.

access to treaty-based arbitration should be made conditional on exhaustion of domestic legal remedies.

Before concluding, it is worth reiterating that the above analysis is incomplete. At least two further issues are worth mentioning. First, it is crucial that the costs of the arbitration proceedings are regulated, so as to make arbitration truly accessible to local communities and to less-wealthy host states. Considerations of costs and development should also be reflected in the awards rendered by, for instance, clarifying that damages cannot include lost profits and that they cannot be disproportionate vis-à-vis the host country GDP. It suffices to note that awards are often so high that they unavoidably hamper development.[103] Second, the New Model IA includes a protocol on public debt, which is highly problematic. The protocol has been lucidly criticised by Prof. Schepel because it elevates 'public debt' to the category of 'investment', contributing to increasing the power of a few actors vis-à-vis the rest of society. In his words,

> [p]ublic debt, purchased on secondary markets and *priced according to the risk of default*, should not be regarded as an 'investment' and considered a property right to be protected under international investment law.[104]

This issue is particularly relevant for development, and it is no coincidence that UNCTAD has released specific principles for Promoting Responsible Sovereign Lending and Borrowing. As suggested by Schepel, this problem could be easily fixed by substituting the Protocol with a clause taken from the 2004 Model BIT of Canada, which specifies 'a loan to, or debt security issued by, a Party or a state enterprise thereof is not an investment'.[105]

## 4 Conclusions

The current system of international investment law can be considered a stumbling block on the road to sustainable development. The efforts of the Dutch government to reform its investment treaty regime are accordingly timely and necessary. As discussed in this article, the New Model IA introduces welcome departures from the old Dutch BIT. Some of the most notable innovations include the clarification of the clean hands doctrine and the establishment of obligations for investors. This article, however, has shown that, despite some praiseworthy improvements, the New Model IA, as currently drafted, fails to correct the serious deficiencies characterising international investment law. Overall, the New Model IA falls short of balancing the private interests of foreign investors with the public interest of the host state and its constituencies.

As we have shown, the reiteration of umbrella clauses as well as jargon on 'legitimate expectations' can hinder the realisation of human rights and sustainable development. The lack of procedural and substantive rights for investment-affected communities is one of the most glaring deficiencies of the New Model IA. This article has shown some avenues to remedy this imbalance. It is paradoxical that an international agreement allegedly aimed at sustainable development continues to render local communities invisible, while bestowing exclusive rights and privileges on the investors. If the Dutch government is serious about 'policy coherence', it should revise the New Model IA in ways that truly account for the interests of investment-affected communities and, more generally, for the public interest.

103. For a recent reflection on this theme, *see* K. Tienhaara, 'World Bank Ruling Against Pakistan Shows Global Economic Governance is Broken', *The Conversation*, 22 July 2019, https://theconversation.com/world-bank-ruling-against-pakistan-shows-global-economic-governance-is-broken-120414. In this context, the thorny question of third party funding (TPF) should also be addressed. For an analysis of some problems related to TPF, *see* F. Dafe and Z. Williams, 'Banking on Courts: Financialization and the Rise of Third-party Funding in Investment Arbitration', *Review of International Political Economy* (2020) DOI: 10.1080/09692290.2020.1764378.

104. Schepel, above n. 94.

105. *Ibid*.